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FEBRUARY 21, 1771.

# A N S W E R S

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FRANCIS ANGELO-TREMAMONDO, Master of  
the Academy of Edinburgh ;

T O T H E

P E T I T I O N of Philip Anthony Miller, Oculist  
in Edinburgh.

**M**R. Angelo, the respondent, had for seven years followed his profession in this country, with success and reputation, when he became acquainted with the petitioner, and first formed that connection, the consequences of which have given rise to the present action.

From the knowledge he has had of the inhabitants, and from what he has learned of the laws, manners, and customs, of this country, he could, with equal justice, and as much sincerity, as the petitioner, be eloquent in its praise, without the authority of *Mr. Horace Walpole*. He could present himself at your Lordships bar in the character of an injured stranger, demanding the protection and aid of the law, and think himself as well intitled to pity and compassion as the petitioner. But he trusts too much, from his knowledge of this country, to the humanity of its inhabitants, and the justice of its laws, to ask any thing more than what he is sure of obtaining, a candid and impartial review of his cause.

The facts necessary for understanding the merits of this cause, are few, the principles and precedents of law are various ; both of  
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them, the respondent in his petition stated at what he thought sufficient length, but the petitioner having again brought his cause under your Lordships consideration, the respondent must resume them, with such additional arguments as may be necessary to obviate what has been offered by the petitioner upon the point of law.

The respondent never had an inclination to enter upon any facts, or give any detail, which was not absolutely necessary to his cause. If he had, by this time he must have relinquished the idea, from having been witness to the censure your Lordships so justly bestowed upon his antagonist.

And here the counsel for the respondent must take the liberty to observe to your Lordships, that though recalling the petition was as much as a court of justice ought to have done, to preserve the proper decorum in judicial proceedings, and save the respondent from the consequences of such an attack upon his character, yet as the petition has been industriously spread through this town, and even transmitted to different parts of the country, the defender's reputation still runs a risque of being hurt from the insinuations and assertions therein contained. He therefore hopes your Lordships will forgive him for taking this method, which is the only one left him, of contradicting reports, which, if rashly believed by the world, and past over in silence by the respondent, may have the effect of hurting him essentially in his profession, and destroying a character which he has for so many years preserved, not only unblemished, but approved.

He will not touch upon the particular facts, but, in general, give them that firm and bold denial, which an honest mind, conscious of its own integrity, ever gives to the aspersions of the unthinking, or designing; and as he has been accused of using in this petition the terms of wounded friendship and insulted generosity, he leaves it to the petitioner to consult his own heart, and ask it whether or not they are unmerited. But, to conclude a subject, upon which the respondent's keenness will be easily forgiven, he begs leave to aver to your Lordships, and to those who may read this defence, that, had not the petition been withdrawn, he could, from the face of it, without the trouble of a proof, have shown that few facts charged in it, had any foundation at all, and

and that those which had, were grossly exaggerated and misrepresented.

The case then before your Lordships, resolves into this simple question in law, How far the promises said to have been made to the petitioner by the respondent, on the future event of his being married to his daughter, are competent to be proved by the parole evidence of those present at the alleged communing, or referred to the oath of the party?

The petitioner has endeavoured to lead your Lordships from the question before you, to one quite of a different nature: he has argued, in his petition, as if the promises in question had been an onerous contract of marriage, solemnly entered into between him and the respondent's daughter, but in doing so, he is not aware that he has stept aside from the nature of his claim, as originally laid in his summons, where he uniformly demands, not the performance of a *bilateral and onerous contract* but the delivery of certain moveables, or sums of money, which he alleges were *promised* to him by the respondent. The words of the libel are, "And the pursuer having made his addresses to the said Mary Tremamondo-Angelo, in the view of marriage, she, with the consent of her said father, agreed to be his wife, and they were accordingly married. That the said Francis Tremamondo-Angelo, previous to the pursuer's marrying his said daughter, *promised* to him, that in case the marriage betwixt the said Mary Tremamondo-Angelo, and the pursuer, Philip Miller, took place, that he would give to the pursuer a diamond ring worth 50 guineas, or in place thereof, 50 guineas, &c." and afterwards, that the pursuer, upon the faith of these *promises*, having been accordingly married to the said Mary Tremamondo-Angelo, the said Francis Tremamondo-Angelo, after said marriage, did renew and confirm the *promises* above mentioned, made by him previous thereto, but in a short time thereafter, thought proper to refuse performance of the whole of them. And albeit, the said Francis Angelo has been oft and diverse times, desired and required to have performed to the pursuer and his said spouse, the *promises* above recited to them, yet nevertheless, &c."

The respondent has quoted thus largely from the summons, as the words of it must clearly prove to your Lordships, that from the

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the time that these promises are said to have been made, till after the commencement of this action, the petitioner pretended to have trusted for the sums claimed, not to any *contract, agreement, or bargain* whatever, but to the naked *promise* of the respondent; and it is only now, when he is refused the mean of proof, he desired to establish them as *promises*, that he has endeavoured to dress them up as a marriage *contract*, or *pactum dotale*, in hopes of obtaining for them, that mode of proof, to which, by their real nature, they are not intitled; that this has been the idea of the petitioner, appears equally plain from the general tenor of the summons, as from the particular words in which its narrative proceeds, *Promises* is the term all along employed; the respondent is said to have *promised* the petitioner; the petitioner is said to have trusted to these *promises*; to have demanded performance of these *promises*; and the respondent is said to have refused these *promises*; nor is *contract, agreement, bargain*, or any other term of that nature to be found in it, either in word or idea.

Such was the nature, and such were the terms, of the original summons, and it must appear a very strange change of ground, to tell your Lordships, as he does in his petition in capital letters, that it was *covenanted and agreed*, that the respondent should give him the moveables libelled for, as if, instead of being repeating the alledged terms of a gratuitous promise, he had been transcribing the precise words of a solemn written contract; but this piece of finesse will neither avail the petitioner, nor mislead your Lordships, who will never suffer him at this late period of the cause, to found his claim upon a ground, not only different, but opposite to the express terms of his libel; nor will the defender, as he seems to expect, "talk no more of verbal promises, and pretend to class under *that denomination, such a mutual contract as the one now in question*;" for the respondent shall first proceed to state his cause upon that ground on which the petitioner originally attacked him, and on which he has all along defended himself, and shall then follow him to that ground to which he has so improperly removed.

There are but three methods in use in the law of this country, for proving or disproving any fact or circumstance whatever, viz. by writing, by witnesses, and by the oath of the party; and the law has very exactly distinguished what alledgences are relevant to



to be proved by each of these different modes of probation. And it is by the last of these methods alone, the respondent insists, that the obligation attempted to be fixed upon him can be established; for the law has very wisely taken care, in fixing and determining the different methods of proof, competent in different cases, to employ such as are the most effectual for discovering the truth, and, at the same time, the least liable to error and misapprehension. Accordingly, in most cases, where, from the nature of the circumstance to be proved, if writing can possibly intervene, the law has declared it to be, in some cases, the only method, and, in every case, the strongest and most valid. In other cases, either from their nature, or from some particular considerations of utility, proofs have been allowed, by the oaths of witnesses: Thus, from their nature, every act or deed, which is merely an object of the senses, can be proved only by witnesses; and certain things, which, upon the general principle, by admitting of writing, would be probable only *scripto*, from considerations of utility, are suffered to be established by the oaths of witnesses: Thus, from the nature of nuncupative legacies, providing they do not exceed 100 l. Scots, they are allowed a proof by witnesses, though, from the nature of the deed itself, writing is requisite; and this indulgence the law has allowed from this consideration, that, in many cases, a dying person has it in his power to express his will, with regard to his property, in words, when, from the weakness of his body, or the suddenness of his end, it might be impossible to do it in writing. The law has likewise admitted the same mean of proof in all bargains, which have known prestations naturally arising from them, concerning moveable subjects, and that to the greatest extent. This is a deviation from principle, and introduced merely for the convenience of trade, and to secure that ease and dispatch so necessary in bargains, with regard to moveable subjects, in a commercial country. In one or two other cases, even where the facts admit of a proof by writing, the like indulgences, from similar considerations, are allowed, and these cases are specially laid down in all our law-books; but amongst them the respondent has not been able to find a verbal promise for any payment or prestation, even conditional; nor has he been able to discover any reason for ranking such promises under any of the heads upon which a proof by witnesses is allowed: On the contrary, he finds promises

or obligations of this nature classed amongst those cases where the law has expressly rejected a probation by witnesses; for he finds that the law has rejected the testimony of witnesses, 1st, In payment of any sum above 100l. Scots. 2dly, In promises, though for the smallest trifles. And, 3dly, In all contracts, where writing is either essential to their constitution, or where it is usually adhibited. Under one of these heads, even by the petitioner's own arguments, must the present case fall; for it is either a simple promise, or a contract of such a nature, as that writing is either essential to its constitution, or usually adhibited. Upon the first of these suppositions, the respondent will argue, while he states his cause upon the grounds on which the summons proceeds, and in the manner he has all along defended himself; and, upon the last, he will answer the petitioner, when he comes to follow him to that remote ground to which he has retired.

With regard then to verbal promises, to which, whether gratuitous or not, the law has expressly refused a probation by witnesses; the respondent shall resume, as shortly as possible, the arguments which he formerly laid down in his petition, and upon which he received your Lordships judgment in his favours. He does not allege that it is because there is any thing less sacred in a verbal promise, than in the most firm and valid contract in writing, that the law has denied it a proof by witnesses, but from a principle of utility alone.

Witnesses can, in all cases, depone with certainty, when the fact or circumstance deponed to is an object of any of the external senses; but must always be liable to error and uncertainty, when they are objects either of the memory or understanding. Thus, a witness may swear with security to the truth of any fact, information of which he has received from any one of his five senses; he may swear as to the size, shape, or colour of any object, because he has seen it; he may swear to any particular sound, or to the voice of any person, because he has heard it; or to the size and construction of any solid body, because he has touched it; but it is impossible for him, with the same, or any degree of certainty, to depone to the exact words in which a promise was made, or the exact meaning intended to be conveyed by particular expressions. In the one case, he swears to a plain and evident fact, which is the object of sense; but, in the other, to an abstract idea or sentiment, which

which is the object of the memory or of the judgment; and which, often, may be made that of the imagination.

If this shall be your Lordships idea, with regard to probation by witnesses in general, much more will it be so, the respondent trusts, in the present case; for he will put your Lordships in mind that he is a foreigner, an Italian, and, of consequence, unacquainted in a great degree with the language of this country, as well as with the French, which is now the general language in use amongst foreigners of different nations. If then, in general, witnesses are held liable to mistake the exact meaning and intention of promising or contracting parties, much more are such errors or misapprehensions likely in his case, when he himself, if he made the alledged promises, must have made them in a language to the idiom and expressions of which he is a stranger; and when the witnesses, if they heard such promises, heard them in a tongue of which they were as much, if not more ignorant.

The respondent having said this much upon the general point, and hinted his own situation in particular, he shall proceed to establish those principles, upon the strongest authorities in the law of Scotland.

The doctrine argued for by the respondent is laid down by all the writers upon the law of this country. Lord Stair lays down the rule in the following words: "Promises, with us, are not probable by witnesses, though within 100 l. Scots," which he confirms by two decisions (which the respondent shall afterwards mention). "The like was found of a promise engaging for a party who bought goods, not being a partner in the bargain; for promises, when they are parts of a bargain about moveables, are probable by witnesses. And the reason that our custom gives no legal remeid for performance of promises of things of importance by witnesses, is the same that the Roman law gave no action upon naked pactions; to prevent the mistakes of parties and witnesses in communings. So now, when writ is so ordinary, we allow no process for promises, as a penalty against those who observe not so easy a method." The same doctrine is laid down by Lord Bankton: "A gratuitous promise, with us, is binding without writing, or that form of obligation called Stipulation, required by the civil law; but where writing does not intervene, being only a bare emission of words, it is not competent." Lib. 1. tit. 10. § 4.  
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"tent to be proved by witnesses, though within 100 l. Scots, because witnesses are apt to mistake the intention of parties, or import of words, and one might be thus ensnared, by a bare turn of expression." The same is the opinion of Mr. Erskine, in his institute: "The lubricity of testimonies made it necessary to bring probation by witnesses within a narrow compass. The law of Scotland rejects the testimony of witnesses, 1mo, In payment of any sum above 100 l. Scots, which must be proved either *scripto vel juramento*. 2do, In all gratuitous promises, which, though for the smallest trifle, cannot be proved by witnesses; since, as their force depends entirely upon the import of the words uttered by the promiser, he may be misunderstood by inattentive hearers."

Such is the opinion of these three respectable authors upon this point; they all concur in declaring, that promises cannot be established by the oaths of witnesses, but must depend for proof upon the writing, or the oath of the party; and it is upon the principle, formerly laid down by the respondent, and, upon that alone, that they found these opinions. To strengthen these arguments, the respondent shall quote another passage from Lord Bankton, where, speaking of promises of marriage, he says, "Where marriage is to be made out, by a promise of marriage, and subsequent *copula*, the promise must be proved by the defender's oath, or writing; for our law rejects parole evidence, in promises of all kinds." Nothing can be more strong and positive than this opinion; it is not in gratuitous promises alone, that this learned author rejects parole evidence; it is in promises of all kinds, even in the case of a promise of marriage, upon the proving or disproving of which, more may really depend, than on the performance of any promise whatever, with regard to moveables, or sums of money. If, in any case, a proof, by witnesses, were allowed to establish a promise, this is the case, which, from every consideration, is intitled to indulgence; the fortune, happiness, and character of one of the parties must depend upon the performance of such a promise; nor are such promises gratuitous, for, in consequence of them, before this maxim of the law can take place, one of the parties must have sacrificed, what millions cannot restore.

When the respondent compares such a case as this with his own, when he considers that his promises are only alledged to have been pecuniary,

pecuniary, and that the promises here are of entering into that state, which, after the connexion pre-supposed, is of the deepest and dearest consequence to her, who receives the promise, and, on the performance of which, her future happiness or misery must depend: He must suppose the principle, that refuses a proof by witnesses, to be most firmly established in law, and cannot even fancy, that when refused in so strong a case, it will be allowed in one so much weaker.

That verbal promises are incompetent to be proved by witnesses, does not rest alone upon the opinion of lawyers, but is fortified by the strongest and most apposite precedents, to be found in the record of any court. The latest and most remarkable decision the respondent shall produce, is that of M'Lintock against Tassie, June 1764. M'Lintock having done ultimate diligence against Tassie's son, upon a bill granted by him, and he being in the hands of a messenger, his father promised, if Macklintock would stop the execution of the caption, and liberate him, he would not only assist his son in working up a stock of leather, then in his tan-pit, which, when sold, would pay the debt, but would likewise become bound to discharge the debt itself. In this case, though it was pled, that this was not merely a gratuitous promise, but a mutual obligation, by which Tassie became bound for his son's debt, and Macklintock, on his part, consented to his liberation; and that, in consequence of this agreement, Macklintock had performed his part, by liberating Tassie's son, and, in so doing, had lost every security for the debt, unless Tassie's promise was fulfilled to him; yet your Lordships found, that Tassie's obligation being founded on a verbal promise, could only be established by his own oath.

The respondent apprehends, that nothing can be more apposite to his case, than the one above recited, with this difference only, that there the arguments for admitting a proof were infinitely stronger than in his, the respondent's. For, in the first place, Macklintock, by bargaining in his native tongue, and, in the presence of his own countrymen, was not like the respondent, in danger either of blundering or of being misunderstood. And, 2<sup>dly</sup>, The obligation, come under, by Macklintock, and the damage suffered by Tassie, were infinitely greater than in the present case, for the favour granted by Tassie, in liberating Macklintock's son, who was

in his power, and just ready to be committed to gaol, was much greater than that which the petitioner, a man advanced in years, and not a temptation in point of fortune, conferred upon the respondent, by marrying his daughter, a blooming handsome young girl, whom he has, again and again, declared he would have married, without even so much as a shift. And, lastly, it was from a firm belief of being paid the debt, due by Tassie's son, that Mac-klintock consented to his liberation; whereas, the petitioner will not, and cannot pretend, that it was solely upon the faith of these promises, that he married the defender's daughter, or that, had he never received them, she would not now have been his wife. If, then, your Lordships, so late as the 1764, pronounced this decision, in a case so much stronger, against the principle argued for by the respondent, he trusts that you will, in a case so much more favourable, be of the same opinion.

In several other cases, where the question has been, what proof was to be allowed of verbal promises, whether onerous or gratuitous, your Lordships have given, uniformly, the same decision; nor can one instance be adduced, where you have decided upon a different principle. In the case of Donaldson against Harrower, 3d July 1668, Donaldson, who had become bound, as cautioner for Harrower's father to Lord Rollo, for 100 l. Scots; to prevent a pouding of his effects, having pursued the son for relief of that debt, upon an alledged promise of payment, which he offered to prove by witnesses, the libel not being above 100 l. Scots, against which the defender having excepted, that being a cautionry and a promise, it was not probable by witnesses; the Lords found the libel not probable by witnesses, although the sum did not exceed 100 l. Scots. This decision is still stronger than the former; for here the court did not found their decision, merely upon its being a promise, but upon its being a cautionry, an obligation of a much stronger nature, and, properly speaking, even a collateral contract, in consequence of which, an obligation is imposed upon both parties; but it was upon this ground undoubtedly, that the court proceeded, that the obligation was verbal, and therefore not probable by witnesses.

Upon the 10th January 1662, your Lordships gave a similar decision in the case of Dewar against Brown: William Catto having bought



bought a web of plaiding from John Dewar, for 47*l*. Scots, for which Thomas Brown was said to have become cautioner. Dewar pursued Brown before the Baillies of Edinburgh, and having proved the alledged promise, by witnesses, obtained decret. Brown suspended, and raised reduction upon this ground, that the decret was obtained upon an unwarrantable probation, admitting witnesses to prove a promise of the emission of words, which are only probable by writ, or oath of party, where there was no bargain between the parties. Your Lordships judgment, which is remarkable, is in the following words: "The Lords having demurred  
 " upon this case, and having searched all the decisions that are  
 " thereanent, they found that such gratuitous promises, not being  
 " in the way of bargain or commerce, or even in that case, as the  
 " party bargained not for himself, but became cautioner for another, were not probable by witnesses, and therefore reduced the  
 " decree."

This case is equally strong with those formerly quoted, and did not the respondent flatter himself, that he had completely established this point, that verbal promises, whether gratuitous or onerous, and even all verbal obligations whatever, can only be proved by the oath of the party, unless where the law has expressly allowed them a proof by witnesses; and that he has convinced the court, that, to this privilege, the case in question is not intitled, he could, from the records of this court, produce many more precedents to support the doctrine he contends for.

The respondent shall now follow the petitioner, and offer some arguments upon the supposition he has assumed, that the promises, formerly insisted upon, are all at once transformed into a contract of marriage. But, before he proceeds, he must premise, that he by no means departs from his original averment, with regard to the summons, which, he still insists, is founded so much upon the idea of a promise, and makes its demands so much upon that footing, as to prevent the petitioner from prevailing in this action, should he even establish, which is impossible, that a contract of marriage was really entered into; for, if pursuers in civil actions were to be allowed, in the course of litigation, to change the ground upon which their summons proceeded, and in so doing, to vary their claim, it would, at once, put an end to all security in judicial proceedings.

ceedings. And if the petitioner should prevail in this action upon any other ground than that contained in his original summons, it would be as absurd and unjust, as if a person criminally indicted, and tried upon the statute against robbery, should, upon its appearing, in the course of the trial, that he was innocent of the robbery, but, upon some other occasion, had been guilty of the crimes of theft or murder, should, without any new indictment for such offences, be found guilty of them, condemned and executed.

The respondent shall now proceed to answer the petitioner's arguments, upon the supposition that the question was, Whether a contract of marriage can be entered into without writing? and, Whether it can receive a proof from the oaths of witnesses? The petitioner has set out with observing, that the oaths of witnesses are undoubtedly, a better mean of proof than the oath of a party, which is known to be one of the modes of a *probatio extraordinaria*.

This position the respondent will not, in general deny, but he will confine it to such circumstances as, by their nature, admit of an exact and certain proof by means of witnesses, and will never extend it to cases which, like the present, depend not upon the proof of any fact, or even word (which, merely as such, he allows may be established in the manner contended for by the petitioner) but upon the intention and meaning of parties, which can be ascertained but in two ways, either by the writing or confession of the party himself.

The respondent must confess himself a good deal surprised at the idea of a verbal contract of marriage, as he has always understood contracts of marriage to require writing as essential to their nature. It is therefore a violent stretch of the doctrine of probation, to insist, that one of the most solemn and necessary contracts known in the law, should be established upon the vague and uncertain words of contracting parties. The respondent holds, that the law requires writing, as essential to all contracts or obligations, which, by their nature, admit of it, and has only remitted this solemnity in some particular deeds, from the idea of utility alone; and these are so expressly mentioned in our law books, that had contracts of marriage been amongst them, it would have been in the petitioner's power to have produced the exception.

The petitioner, seeing that here both law and argument opposed his position, endeavours to rank marriage-contracts under the head

head of bargains with regard to moveables, which have been, for the benefit of commerce, allowed a proof by witnesses, and endeavours to establish this connexion by playing upon the word *commerce*: "Why, says he, should not a contract, in the lawful commerce between the sexes, the most necessary commerce of any, be as well intitled to a proof by witnesses, as any other bargain with regard to moveables?" But the respondent insists, that, if it shall appear to be the general idea of the law, that solemn contracts, which admit of writing, essentially require it, unless contracts of marriage shall be produced, as directly excepted from the general rule, he is intitled to apply the doctrine to them; and he further insists, that there is no contract whatsoever, that so little requires such an indulgence as that of marriage. Certain deathbed-deeds, *morti imminenti*, may be verbally executed, and proved by witnesses, from the situation of the party. The quick dispatch of trade may demand the same indulgence for bargains with regard to moveables; but marriage, when entered into subsequent to a contract with the consent of parents or guardians, commonly moves slow enough to admit of a distinct and solemn contract in writing; and, in general, when such contracts are really intended, contracting parties are commonly attentive enough to their execution. If, therefore, no marriage-contract shall appear in writing, the respondent humbly insists, that the law will suppose no communing upon that subject to have passed, and will not allow the vague and uncertain oaths of witnesses, after the marriage, to fix any obligation upon the parent of either party, more especially, if (as is the present case) the party claiming from such supposed contract, has performed nothing but consummating the marriage, and has, upon his part, become bound for no present or future provision to his wife. Were claims such as this to be sustained, the consequences would be dreadful, and children would become as great a curse as they are now a blessing. For shall it once be established as a precedent in this court, that contracts of marriage may, at the instance of a husband, be proved by witnesses, what is there to prevent the greatest villainies from being practised under its sanction? The respondent will beg leave to show the strength of this argument, by supposing a case which might easily happen.

A man has a numerous family of children; a villain (which is a thing very possible) marries one of his daughters; commences

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an action against the father, and proves, by the oaths of two witnesses whom money will procure to swear any thing, that the father verbally contracted his whole fortune with this daughter. The witnesses swear positively to the fact. It appears they have been present with the father and son-in-law at the time they are alleged to have contracted, which may easily have been brought about on purpose. And, if the law is such as the petitioner contends for, a judge must strip the father of all his substance, and rob the children of that succession, to which, by the law of nature, and an equal share in their father's affections, they are entitled.

This doctrine, however dangerous it is, the petitioner has endeavoured to establish; and, failing to do it by the law of Scotland, he has had recourse to the Roman law. But had he established his general doctrine from the authorities upon that subject, which he has not, it would not affect the present cause; for the respondent will agree with him that the Roman law goes farther in allowing proofs by witnesses, than the law of this country, and even permits that method of probation in almost every case, even in such as the petitioner himself must allow to be confined by our law to a proof in writing.

But were the doctrine contended for by the petitioner clearly established by the Roman law, it could not possibly sway your Lordships in the determination of this cause; for, in the first place, it is only when the law of Scotland is silent that your Lordships resort to that of the Romans. In this case ours is clear and distinct, and theirs can be no authority. Besides, the question before your Lordships is of that nature, that it must be determined more upon the principle of utility, and from the particular practice and situation of the country, than from the principles or practice of the ancient law either of this or any other nation. If, therefore the respondent has established it to be the practice of this country to reduce marriage contracts into writing, a fact which nobody will deny, and that the law of Scotland requires writing as essential to the nature of such contracts, he may hold very cheap both the opinion of the learned Voet *de pœtis dotatibus*, and that of Muscardus *de probationibus*, the last of whom in particular seems to be of opinion, that every fact, word, or circumstance whatever may be proved by the oaths of witnesses. But to resort to such an opinion as this in the present case, is as absurd as

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as it would be to argue, that, because by the ancient law of this country, most points might be proved by witnesses, even that possession which is essential to heritable rights, and which depended upon the testimony of the *pares curie*, and every point might now be established in the same manner, when the practice, and even the nature of the law on that subject is totally changed, and proofs by witnesses in every case incompetent where writing can be admitted, unless the law, from notions of utility, has granted an express exception.

The petitioner has endeavoured to make these promises, or, as he calls it, *marriage-contract*, appear to have been merely presents promised or covenanted to be given to his wife, and insists that they are of the nature of those gifts known in the Roman law under the name of *jocalia*; and he appeals "to the many men of business in this court, and over all Scotland, who have been employed in executing marriage-settlements, if it is customary to make out written-contracts, when nothing else is contracted to be given with the bride, but a few moveables, as what were termed *jocalia* in the Roman law, or other such things."

Here the petitioner has a second time changed his ground, and the respondent will in a very few words answer his new argument.

It is very true, that it is not customary to reduce into writing the gifts given to a woman upon occasion of her marriage; and it is for this reason, that the constant custom of this country is to deliver them to the bride at the time of the marriage, it being well known that no action would lie at common law to force delivery of them. And so sensible are the common people of this country, that this is the case, that when the presents to be given are not in readiness at the time of the marriage, the wife remains after consummation, at her father's house, till they are ready to be sent home along with her; and the ceremony of her taking possession of her husband's house on this occasion is called the *marriage*. This circumstance amongst the common people, the petitioner, were he as well acquainted with their manners and customs as he seems to be with their songs, would have known. The respondent is sensible, he has drawn these answers to a great a length, but when it is considered, that, first, he has been obliged

obliged to defend himself upon the original grounds of the summons, upon which he still insists this cause must be judged; and afterwards to follow the petitioner to the ground he has taken up, with an intention to lead your Lordships from the real conclusions in his libel, and from the just view of this cause, he will stand forgiven, more especially, as the sums claimed by the petitioner, amount to no less than 600 l. sterling, which the petitioner intitles a few moveables given to his wife, in name of *jocalia*. But there is a nearer and dearer cause for that anxiety which has made the respondent take up more of your Lordships time, than he would otherwise have done, and that is the attack that was made upon his character in that petition, which your Lordships so justly refused. Still fearful of its consequences, he has been anxious to give your Lordships and the world, the best view of his cause; his character is dearer to him than the sum claimed by the petitioner, though more than his all, and if he shall be found liable to pay these sums, he will give the petitioner that little all, accompanied with these lines from the Prince of English Poets,

" Who steals my purse, steals trash :—'tis something,—nothing ;  
 " 'Twas mine ;—'tis his ;—and has been slave to thousands.  
 " But he who filches from me my good name,  
 " Robs me of that which not enriches him,  
 " And makes me poor indeed."

*In respect whereof, &c.*

HENRY ERSKINE.



